

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re Application of)

GTE CALIFORNIA INCORPORATED)

For Section 214 Authority to provide)
video channel service to an affiliate)
in Cerritos, California)

File No. W-P-C-7097
CC Docket No. 94-81

To: Chief, Common Carrier Bureau

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PETITION TO DENY

APOLLO CABLEVISION, INC.

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SUMMARY

The actual scope of the certificate authority being requested by GTE Telephone is unclear. While it appears that a simple extension of earlier authority for GTE Service Corp.'s provision of Center Screen and Main Street services is requested, other references (and the simultaneously-pending tariff provisions in GTE Transmittal No. 909/918) suggest that a much broader authority may be sought.

Even viewed narrowly, there is no adequate public interest basis for granting the application. The GTE experimentation authorized by the Commission in 1989 has been concluded, and the current GTE operations are a commercial sham; GTE Service Corp.'s current costs are more than 25 times its revenues. Moreover, a continuation of the current GTE Service Corp. services is a wasteful use of system bandwidth -- one which simply precludes Apollo from providing Cerritos residents other desired, available cable programming.

Considered a request for unlimited authority, the application is even more inconsistent with the public interest. An enlargement of GTE Service Corp.'s cable programming activities would be directly contradictory to that entity's civil contracts with Apollo, and would be anticompetitive. Moreover, it would represent conduct for which the City of Cerritos has granted GTE no franchise authority.

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PETITION TO DENY

Apollo CableVision, Inc. ("Apollo"), the cable television franchisee in Cerritos, California, and a party in the CC Docket No. 94-81 proceedings, by its attorneys, respectfully requests that the captioned application, filed July 28, 1995, be denied. In support of this petition, the following is submitted:

BACKGROUND

In GTE California, Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994), reh. denied, No. 93-7094, Order (9th Cir., May 19, 1995), the Court of Appeals held that GTE Telephone's earlier Section 214 authority to provide video channel service to its affiliate, GTE Service Corp., expired on July 17, 1994.⁴ In an Order released

⁴ The Court specifically eschewed reaching any such conclusion with respect to Apollo. Id., 39 F.3d at 945. Moreover, the Court made clear that any earlier concerns the D.C. Circuit may have entertained concerning Apollo and the Commission's "affiliation" Rules in National Cable Television Association v. FCC, 914 F.2d 285 (D.C. Cir. 1990), were now moot:

July 28, 1995 in the captioned docket (DA 95-1679) ("July 28 Order"), the Bureau recognized that GTE Telephone's authority to continue service to its affiliate pursuant to the Court's stay had also terminated, and directed the carrier either to file a Section 214 application to support its Transmittal No. 909/918 service, or to withdraw that service from its tariff. (Id., ¶ 5.) If the carrier elected to apply for such Section 214 authority, the Bureau stated it would grant temporary certificate authority pending action on the Section 214 application. (Id.)

With remarkable prescience, GTE Telephone filed the captioned application on the same day the Bureau issued the July 28 Order. Thereafter, the Bureau granted GTE Telephone "temporary authority to continue to provide video channel service to Service Corp. while [the carrier's] application for a permanent Section 214 authorization is pending." (Supplemental Designation Order, DA 95-1796, released August 14, 1995, ¶4.) By Public Notice dated August 16, 1995 (Report No. D-813), the Bureau invited public comment on GTE Telephone's Section 214 application.

[Continued from previous page]

Since the participation of Robak in the project is long since finished, GTECA will not need a waiver of the Commission's affiliation rules which led to the remand by the D.C. Circuit. If GTECA does apply for a new waiver, the Commission will not be bound by the terms of the D.C. Circuit's mandate.

GTE California, Inc. v. FCC, supra, 39 F.3d at 946, n.5.

DISCUSSION

At the outset, it should be made clear what is not at issue here. In its application, the carrier asserts that a grant would be "consistent" with court decisions "overturn[ing] the statutory ban on LEC provision of programming services to end users," and would "fulfill" Commission statements relating to video dialtone, including its "recognizing" that carrier provision of video services "would enhance competition and increase diversity of services made available to the public." (App., p. 5.) However, the carrier does not here propose itself to provide cable programming to end users; it seeks authority instead to provide "video channel service" to GTE Service Corp., as it does to Apollo.²¹

In its July 28 Order, the Bureau anticipated GTE Telephone's efforts to relate recent court rulings on the statutory cable/telephone cross ownership limitations to this Section 214 proposal, and has distinguished such rulings:

We recognize that a district court has enjoined our enforcement of the statutory restriction against a local exchange carrier's provision of video programming to end users. We conclude, however, that that holding does not affect our authority to require GTECA to obtain authorization under Section 214 of the Act in order to maintain the facilities it uses to

²¹ Elsewhere, GTE Telephone has stressed (disingenuously, in Apollo's view) GTE Service Corp.'s independence from the carrier, and the carrier's distance from programming activities in which its affiliate is engaged. See, e.g., "Consolidated Reply to Petitions to Reject or Suspend Tariffs", June 1, 1994, p. 26 n. 21 ("Under GTECA's video channel service offering, GTECA will exercise no control, editorial or otherwise, over . . . Service Corp.'s . . . selection of programming.")

provide transmission service offered [to GTE Service Corp.] under Transmittal 909.

Id., ¶ 4. The Bureau further distinguished service to Service Corp. here from the blanket Section 214 authority being considered in Docket No. 87-266, because the authorization under consideration there "is for cable television service rather than video channel service that is the subject of this proceeding."
Id., n. 15.

First Amendment rights, therefore are not involved in a consideration of the captioned application. Neither are questions concerning Commission authority for carriers' provision of video dialtone or video programming to end users in their local exchange area. What is at issue is whether a grant of this application, in the unique circumstances of Cerritos, California, is "required" by "the present and future public convenience and necessity." 47 U.S.C. § 214(a).

I. The Scope of the Authority Requested is Unclear

In approving the Cerritos project in 1989, the Commission carefully limited the certificate authority for GTE Service Corp.'s activities to that requested by the carrier -- specifically defined NVOD and VOD experimentation.^{3/} The temporary

^{3/} See, e.g., General Telephone Company of California, 4 F.C.C. Rcd 5693, 5700 (1989):

General has conceded that it is not necessary to the near video-on-demand test that it provide the video programming. Therefore, in order to tailor a waiver no broader than necessary to achieve the public interest goals discussed above, we will require that General contract with another entity to provide video

[Continued on next page]

authority under which GTE Telephone is currently providing service to its affiliate is no broader than its initial authority.^{4/} And at points in the captioned application, it appears that GTE Telephone seeks merely to continue GTE Service Corp.'s earlier-authorized activities:

A grant of this Application is in the public interest in that it would enable GTECA to continue to provide video channel service over its existing broadband network to Service Corp., thereby ensuring the continued provision of Center Screen and GTE Main Street services. These services have been available to the residents of Cerritos since the inception of the Cerritos project in 1989. Since its introduction, Center Screen has become increasingly popular with Cerritos residents as it provides an affordable alternative source for movie viewing. GTE Main Street, an interactive television service, provides a variety of educational, information, travel, shopping, entertainment and financial services to subscribers. GTE Main Street is also operational at Cerritos City Hall, four elementary schools and two high schools.

[Continued from previous page]

programming and to implement General's near video-on-demand and pure video-on-demand experiment on the coaxial and fiber facilities. We do not intend to prevent General from entering into a contract for video programming with Apollo, should General choose to do so. In order to conduct its near video-on-demand experiment, we anticipate General will work closely with its programming contractor to define and oversee the experiment. [Footnotes omitted.]

See also, e.g., the predicate ruling by the Bureau in General Telephone Company of California, 3 F.C.C. Rcd 2317, 2323 (1988) ("General has emphasized that the [system] capacity [to be used by GTE Service Corp.] is intended to serve as a research and testing facility."

^{4/} See the Bureau's August 14, 1995 Order herein (DA 95-1796):

[We] hereby grant GTDC temporary authority to continue to provide video channel service to Service Corp. while its application for permanent Section 214 authorization is pending.

. . . [A] grant of this application will insure that Cerritos subscribers will continue to have access to video services that they have enjoyed for years.

Application, pp. 4-5.^{5/}

At other points, however, there are suggestions that the carrier may be seeking authority for a broader service to GTE Service Corp. At page 5 of the application, for example, the carrier relates the proposal to "LEC provision of programming services to end users", to the Commission's "pronouncements in the video dialtone proceedings", and to "enhance[ing] competition" in video services to the public. Moreover, pending tariff revisions in GTE Transmittal No. 909/918 -- proposals which, presumably, would implement the authority sought in this

^{5/} As to the validity of GTE Telephone's self-congratulatory characterizations of its Cerritos services, see, e.g., GTE California Incorporated v. FCC, supra, "Apollo CableVision, Inc.'s Response to Petitioner's Motion for a Stay Pending Judicial Review," August 31, 1994, pp. 16, 17 n. 24.

. . . GTE Telephone's contention concerning the potential loss of its "innovative services" should be kept in perspective. The major service involved -- "Center Screen" -- is one which permits subscribers to order movies on 28 of the GTE-reserved channels at intervals of 15-30 minutes by use of their TV remote controllers; charges for any movies ordered are billed later. Movies. Like in hotel/motel rooms. While "Center Screen" is offered to all 7,100 system subscribers without charge, only about half have accepted the offer. There are no subscribers to "Center Screen" who do not also take Apollo's general cable fare.) GTE Service revenues from "Center Screen" are a small fraction of its costs to provide the service, and fewer than 20 movies per day are ordered system-wide, on average. . . .

GTE Services' "Main Street" service, which offers some Prodigy-like interactive services (e.g., video games, UPI news, shopping services) on 2 system channels for a monthly \$10.95 charge, has fewer than 200 subscribers

Section 214 application -- contains no limitation to earlier-authorized GTE Service Corp. activities in Cerritos. Rather, as presently structured, those tariff revisions would appear to permit GTE Service Corp. to offer end users any and all forms of cable programming fare.^{6/}

As discussed below, whether reviewed narrowly or broadly, the captioned application should not be granted. But as a minimum threshold matter -- particularly given the carrier's efforts in recent years to unilaterally revise the character of its operations, and the scope of its Commission authority, in Cerritos -- a clear understanding of what certificate authority is indeed being sought is essential to any proper action here.

II. Viewed as a Request to Perpetuate GTE Service Corp.'s Current Services, the Application Should be Denied

The Commission's 1989 authorization to GTE Telephone contemplated a 5-year period of VOD and NVOD experimentation by GTE Service Corp. More than two-years ago, GTE itself acknowledged that its Cerritos authority would expire in 1994, that its experimentation was being concluded, and that it would be disposing of GTE Service Corp.'s lease rights to the Cerritos system bandwidth. As it wrote to Apollo in June of 1993:

As you know, all GTECA's bandwidth capacity in Cerritos in excess of the 275 MHz already being used Apollo, is currently being used for experimental purposes by GTE companies

^{6/} See, "Supplemental Opposition by Apollo CableVision, Inc.", September 11, 1995, pp. 14-16.

under the Lease Agreement between GTECA and GTE Service Corporation ("GTESC").

As you are also aware, this experimental use of broadband capacity . . . requires a special waiver from the FCC. This FCC waiver grant expires by its own terms in July 1994, unless GTE demonstrates a need to conduct further tests in Cerritos and requests an extension of the waiver for that purpose. GTE has reviewed the status of the Cerritos test bed and has decided not to try to pursue additional experimental activities. Therefore, GTESC will not continue full usage of its bandwidth capacity after the expiration of the waiver grant, for testing or for any other purposes for which permission for a waiver extension from the FCC would be required.²

In fact, while GTE Service Corp. extended its Center Screen and Main Street service offerings beyond July 1994 under the protection of the Ninth Circuit Court of Appeals stay, the number of subscribers for both services has declined since 1993. And as indicated below, GTE Service Corp. sustains extraordinary monthly losses in continuing those offerings. There has been no demonstration here by the carrier that a continuation of this commercial sham would be in the public interest. The Commission was prepared to terminate GTE Service Corp.'s experimental activities in January of 1994. General Telephone Company of California, 8 F.C.C. Rcd 8178 (1993); see also General Telephone Company of California, 8 F.C.C. Rcd 8753 (1993). And there have

² Letter dated June 29, 1993 from R. A. Cecil, GTE Telephone Operations, to Thomas Robak, Apollo CableVision.

been no changes in the character of those activities which would warrant a different result today

Indeed, there are affirmative public interest reasons to terminate the carrier affiliate's current use of the Cerritos system. Most conspicuous is that the GTE Service Corp. offerings are a gross waste of channel space, which serve only to prevent Cerritos residents from a full range of cable services.

A. Current GTE Service Corp. Offerings are a Wasteful Use of Channel Space

Following is GTE Service Corp.'s current utilization of its half of the Cerritos system bandwidth:

<u>Channel No.</u>	<u>Service</u>
40-41	Main Street
42	Center Screen previews
43	Center Screen schedules
44-69	Center Screen movies
70	(blank)
71	Center Screen logo
72	Center Screen previews
73-78	(not accessible on converter boxes)

As can be seen, seven channels (70, 73-78) are entirely unused, while 30 channels are devoted to Center Screen, a hotel-room-like pay-per-view movie service.

Within the Center Screen channel grouping, one channel (71) is used solely for the service logo, another (43) is devoted only to movie schedules, and two others (42, 72) are used purely for movie previews. Twenty-six channels are used to convey an average of 11 movies per week, based on Center Screen's

programming guide for August 1995. "Blockbuster" movies are each allocated 8 channels per week, while other movies range between 2 and 4 channels each per week. In sum, 30 channels are used for a pay-per-view movie service for which there are only 20 purchases per day on average.^{8/}

That GTE Service Corp.'s control of channel space in Cerritos is not commercially rational -- that the community does not economically support the carrier affiliate's service offerings -- is already established. As Apollo demonstrated elsewhere, GTE Service Corp.'s monthly revenues in Cerritos are less than \$3,000.^{9/} Yet the monthly lease charge to its affiliate by GTE Telephone alone under its Transmittal No. 909/918 tariff is \$81,764 -- more than 25 times that amount. Setting aside the anticompetitive concerns such a disparity poses, it is at least clear that if marketplace demand is used as a benchmark for determining whether the public interest "requires" a grant of authority to extend the current service, the answer is resoundingly negative.

^{8/} GTE Service Corp.'s Main Street service is an equally inefficient use of much needed channel space. That service utilizes 2 channels, and offers some Prodigy-like interactive services (e.g., video games, UPI news shopping services) for a monthly charge of \$10.95. The service has fewer than 200 subscribers.

^{9/} See, "Supplemental Opposition by Apollo CableVision, Inc.", September 11, 1995. p. 22 and Attachment 1

**B. GTE Service Corp. Control of Channel Space Denies
Cerritos Citizens Other Desired, Available Cable
Programming**

Because GTE effectively warehouses one-half of the Cerritos system capacity, residents are denied available and desired cable services. All of Apollo's channels are utilized -- for community-service use required under the franchise (2 channels), for off-the-air television stations required to be carried by the Commission's Rules (8 channels), for cable network programming (30 channels), and for pay-per-view or special events (1 channel). Following are additional services able (and intended) to be provided by Apollo, but prevented by GTE's Service Corp.'s continued use of system bandwidth:

The Learning Channel	CNN Headline News	The Weather
Comedy Central	HBO 2 & 3	Channel
The Cartoon Network	Action PPV	Showtime 2 & 3
Playboy PPV	Bravo	Viewers Choice PPV
Request PPV	The History	The Outdoor
The Golf Channel	Channel	Channel
The Sega Channel	Video Hits 1 (VH1)	Classic Sports
Court TV	America's Talking	Network
ESPN2	The TV Food	Country Music
CNN Headline News	Network	Television
HBO 2 & 3		FX

In Apollo's view, granting permanent Section 214 authority to continue the GTE Service Corp. services would simply continue to deny Cerritos residents available desired services for no discernible reason than GTE's (undefined) future cable service ambitions. Such an action would be antithetical to, not consistent with, the public interest

**III. If Construed as a Request for Unlimited Authority, the
Application Defies the Public Interest**

If the authority GTE Telephone here seeks would permit its affiliate an unlimited ability to offer cable services to Cerritos residents, such authority is inappropriate for at least two immediately obvious reasons. First, it would be a direct breach of non-competition provisions in agreements between Apollo and both GTE Telephone and its affiliates. A 1989 Amendment to the Lease Agreement between Apollo and GTE Telephone contained the following provision:

GTEC agrees not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming in the city during the term of the base (including any extensions thereof not in excess of seven (7) years beyond the initial term).^{10/}

GTE Service Corp. similarly agreed with Apollo in an "Enhanced Capability Decoder (Converter Box) Agreement" executed November 16, 1989:

GTESC agrees not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming . . . in the City of Cerritos during the term of the Lease agreement dated January 22, 1987, as amended, between GTE California Incorporated and Apollo (including any extension thereof not in excess of seven (7) years beyond the initial term)^{11/}

For reasons discussed at length in Apollo's earlier pleadings in this docket -- relating to tariff issues currently awaiting

^{10/} See, Attachment 10 to the "Brief on Behalf of Apollo CableVision, Inc.", August 15, 1994, ¶ 7(a).

^{11/} See, Attachment 14 to the "Brief on Behalf of Apollo CableVision, Inc." August 15, 1994, ¶ 2(d).

decision -- Commission abrogation of Apollo's civil contact rights by a grant of such authority here would be plainly improper.

Second, neither GTE Telephone nor GTE Service Corp. has the required local franchise authorization to provide general cable services in Cerritos. As the Bureau is aware, Section 621(b) of the 1984 Cable Act, 47 U.S.C. § 541(b) prohibits the provision of cable services without a local cable franchise. The City of Cerritos has itself made clear that while it did authorize GTE Telephone to construct the system facilities, it has never -- either directly or indirectly -- granted GTE Service Corp. authority to provide general cable services in Cerritos:

There are specific requirements in the GTECA [construction] franchise that prohibit GTECA from selling, leasing, assigning or transferring the franchise or any of the rights and privileges granted thereby, in whole or in part, either by agreement, merger, consolidation or otherwise, without the approval and consent of the City Council. (GTECA Franchise, Article 7). The City has never granted a franchise to Service Corporation. Nor was the approval and consent of the City Council either sought or obtained by GTECA in connection with any transfer or assignment of franchise rights to Service Corporation prior to the filing of [Transmittal No. 874].

Petition By City of Cerritos to Suspend and Investigate, filed May 24, 1994, p. 25 (footnote omitted).^{12/}

While GTE Telephone has simply asserted elsewhere that GTE Service Corp. would need no local franchise^{13/}, -- that position has been directly challenged by all other parties to these proceedings, and is one flatly inconsistently with the 1984 Cable Act and clear precedent thereunder.

CONCLUSION

Under Section 214(a) of the Communications Act, the Commission must certify that the construction proposed is "required" by "the present and future public convenience and necessity." 47 U.S.C. § 214(a). Section 214(c) grants the Commission power to grant, refuse or condition any such certificate authority "as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c). In this instance, the certificate authority requested is far from "required" in the public interest, and should be denied. At a minimum, any grant of the captioned application must be limited to existing services being provided by GTE Service Corp., and be

^{12/} See also Letter from John B. Richards, Esq. to FCC Chairman Reed E. Hundt, dated June 8, 1994, in which counsel for the City makes clear GTE Service Corp. has no franchise authority to provide cable programming in Cerritos, and that the "City is statutorily entitled to require that [GTE] Service Corp. obtain a franchise upon terms and conditions acceptable to the City." (p. 3). And see NCTA's "Petition to Reject, or to Suspend and Investigate", May 9, 1994, pp. 3-4 ("No franchise has been awarded to [GTE] Service Corp.")

^{13/} See Letter from John F. Raposa, Esq. to A. Richard Metzger, Jr. dated June 14, 1994, pp. 5-6

subject to the contract and franchise limitations discussed
herein.

Respectfully submitted,

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September 13, 1995

CERTIFICATE OF SERVICE

I, Alicia L. Allen, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 13th day of September, 1995, caused a copy of the foregoing PETITION TO DENY to be served on the following by first-class mail, postage prepaid:

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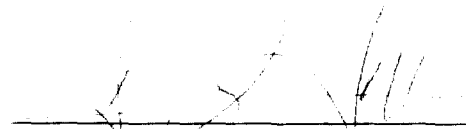
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